

**BEFORE THE COMMISSION ON COMMON OWNERSHIP COMMUNITIES  
MONTGOMERY COUNTY, MARYLAND**

RUSSELL R. SPEARS  
5100 Dorset Ave. Apt. #303  
Chevy Chase, Maryland 20815

Complainant

v.

Case No. 368-O

KENWOOD HOUSE, INC.  
5100 Dorset Avenue  
Chevy Chase, Maryland 20815

Respondent

\* \* \* \* \*

**DECISION AND ORDER**

The above-entitled case having come before the Commission on Common Ownership Communities for Montgomery County, Maryland, pursuant to Sections 10B-5(i), 10B-9(a), 10B-10, 10B-11(e), 10B-12, and 10B-13 of the Montgomery County Code, 1994, as amended, and the Commission having considered the testimony and evidence of record, it is therefore this 1st day of October, 1998 found, determined and ordered as follows:

**BACKGROUND**

Russell R. Spears (Complainant) is, together with his wife, owner of a share in Kenwood House, Inc., a cooperative located at 5100 Dorset Avenue, Chevy Chase, Maryland 20815. The Spears own apartment #303 in that building. Mr. Spears filed a Complaint with the Office of Common Ownership Communities on or about July 18, 1997. The Complainant alleges that the Board of Directors of the cooperative failed to take necessary steps to alleviate a noisy situation arising from the elevators that are adjacent to the unit occupied by Mr. Spears. Mr. Spears was requesting that the Board of Directors of Kenwood House repair the common building elevator to a noise free condition in which he claims it operated at the commencement of his tenancy of the building; return all his monthly maintenance fees paid from November, 1996 until the date of repair of the elevators and pay his legal fees.

Inasmuch as the matter was not resolved through mediation, this dispute was presented to the Commission on Common Ownership Communities for action pursuant to Section 10B-11(e). On May 27, 1998, the Commission conducted a public hearing in this case before a panel consisting of Commissioners Laurie Murphy, Lawrence Gaffigan, and, panel chair Jonathan Bromberg.

## FINDINGS OF FACT

Based on the stipulations of the parties and the testimony and evidence of record, the Commission makes the following findings:

1. Kenwood House, Inc. is a Delaware Corporation. According to its Certificate of Incorporation, among its purposes are the operation and management of a co-operative apartment housing project (Certificate of Incorporation, Article 3(a)). The corporation has the power to repair the property (Certificate of Incorporation, Article 3(d)).
2. The Board of Directors of Kenwood House is governed by the Certificate of Incorporation, the By-Laws, and the Rules of Kenwood House. Kenwood House has no Declaration of Covenants.
3. The Complainants are the owners of apartment #303 at 5100 Dorset Avenue, Chevy Chase, Maryland 20815 having purchased the unit in September of 1995.
4. The apartment unit 303 is located adjacent to the main elevator shaft for the cooperative building.
5. Mr. Spears began complaining about noise emanating from the elevator shaft some time in 1996.
6. In March of 1997, a maintenance evaluation of the elevators in Kenwood House was conducted by William Hunt & Associates in which the report (prepared by Chester Calbeck, Jr.) made certain recommendations pertaining to routine maintenance and adjustments to the elevators that he believed would prevent much of the noise emanating from the elevators and the elevator shafts. In his testimony, Mr. Calbeck reiterated the findings of his written report and also claimed that his findings from 1997 were similar to his findings that he had reached in an earlier inspection conducted in May of 1993. Mr. Calbeck testified that the noise emanating from the elevator shaft would be louder as one was closer to the machine room above the fifth floor of the building.
7. Mr. Spears and representatives of Kenwood House conducted further mediation and employed the services of Harold W. Rose of American Elevator Inspection Services, Inc. to conduct an inspection of the elevator system. Mr. Rose's findings of October 22, 1997 are part of the record. Mr. Rose recommended that various steps be taken to help alleviate the noise emanating from the elevators and he also recommended that Kenwood consider a complete elevator replacement program.

8. The Complainant testified that he did not hear noise from the elevators when he occupied the apartment in September of 1995, but that the noise became progressively worse and he now keeps ear plugs in his ears and has put his apartment up for sale.
9. In response to the Complaints filed by Mr. Spears, the building manager, Anthony Anderson, in conjunction with the Board of Directors took various steps to follow through on the recommendations of Mr. Callbeck and of Mr. Rose. In fact, Kenwood retained Mr. Rose's firm to do various repairs to the elevator shaft. Mr. Anderson also reported that a consultant was hired who drafted a plan of replacement of the elevator systems and reported that the cooperative had now advanced the schedule for Capitol Improvement to replace the elevators at an earlier date.
10. Donald Gruelach (of Warfield & Sanford Elevator Co.) reported that there has been an ongoing regular maintenance agreement with his company for normal maintenance of the elevators at Kenwood. He reported that for their age they were in excellent condition, and that the system was 100% safe and functional. Mr. Gruelach reported that he monitored the noise from the elevator shaft in various apartments including that of the Complainant and that he could barely hear any noise.
11. Mrs. Hall, the occupant of apartment #203 for thirty-three years, testified that there was no change in the noise emanating from the elevator from 1995 to the present. She further reported that she had a small television in her bedroom and that the Complainant called her complaining about noise emanating from the television and she removed the television to another room. Mrs. Hall also reported that she was able to hear voices through the walls emanating from Complainant's apartment.
12. The panel also heard testimony from Nancy Hawes, a resident of apartment #503 for the past thirty-six years. Apartments #503 and #203 are in the same line as that of the Complainant and apartment #503 is closest to the source of most of the noise. Mrs. Hawes reported that she never noticed a change in the elevator noise over the past thirty-six years and that she has always heard it in a slight manner in the background.
13. The panel also heard testimony from Pearl Berot who was an employee working for the resident in unit #403. She worked in that unit from January of 1996 through April of 1998, and reported that she never noticed any changes in the amount of noise emanating from the elevator.
14. The panel finally heard from John Breckenridge, the President of Kenwood House Inc., who reported that the Board has adopted a reserve plan for major items and that the elevators are being fully upgraded. The full upgrade was originally

scheduled on the Capitol Improvement plan for the year 2004, however, as a result of the complaints of the Complainant, the schedule has been moved up to the year 2000.

15. The panel finds that there has been no substantial change in the amount of noise emanating from the elevators over the past three years.

### **CONCLUSIONS OF LAW**

Accordingly, the Commission concludes based on a preponderance of the evidence, and after a full and fair consideration of the evidence of record, that:

1. The Board of Directors of the Respondent has acted within its corporate powers in dealing with the issues brought to them by the Complainant. The Commission finds that the Respondent has taken steps to maintain the elevators in Kenwood House as required by its Certificate of Incorporation. It has received expert advice that the elevators are in safe and functional condition, and it is entitled to rely on that expert advice in carrying out its fiduciary duty.

This is not a case where the Commission is called upon to determine whether a covenant has been interpreted reasonably. Rather, this case concerns a matter strictly within the business judgment of the Board of Directors. Accordingly, absent any showing of bad faith, conflict of interest, self-dealing, or other breach of fiduciary duty, the actions of the Board must be upheld.

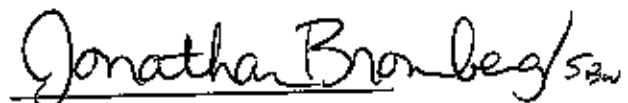
### **ORDER**

In view of the foregoing, and based on the evidence of record, the Commission orders that:

1. The Complaint is hereby denied.

The foregoing was concurred in by panel members Murphy, Gaffigan and Bromberg.

Any party aggrieved by the action of the Commission may file an administrative appeal to the Circuit Court of Montgomery County, Maryland, within thirty days (30) from the date of this Order, pursuant to the Maryland Rules of Procedure governing administrative appeals.



Jonathan Bromberg  
Panel Chairperson  
Commission on Common  
Ownership Communities